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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-869

KEITH ROBERTS,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent.

BRIEF OF INTERVENORS BELOW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Braniff Airways, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., National Airlines, Inc., Northwest Airlines, Inc. and Western Air Lines, Inc. (intervenors below, hereinafter collectively referred to as "Braniff, *et al.*") submit this brief in opposition to the petition of Keith Roberts ("Roberts") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit for review of that Court's decision and judgment in *John E. Moss, et al. v. Civil Aeronautics Board*, Case Nos. 73-1772 and 73-1790, entered on October 16, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which Roberts seeks, is printed in Appendix A accompanying Roberts' petition before this Court and is reported at 521 F.2d 298 (D.C. Cir. 1975).[1]

RESPONSE TO PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

This case presents no issue which should command the Court's attention. There is no conflict between circuits. Indeed, this case has been collaterally considered by the Seventh Circuit which has emphatically stated its agreement with the opinion below.[2] The decision is consistent with the prior decisions of this Court. It presents no constitutional issue, no important procedural or statutory issue, and no issue of general importance.

The case concerns the question of whether there should be recovery of fare increases which became effective through procedural error of the regulatory agency in prescribing the fares. It is a question which has previously been considered and ruled upon by this Court. See *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935), and *United States v. Morgan*, 307 U.S. 183 (1939).

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[1] References to the Court of Appeals opinion will be to the Appendix to Roberts' petition, cited as "Appendix A." This is the second case of the same name involving the same basic subject, and will thus be referred to here as "*Moss II*."

[2] *Keith Roberts, et al.* v. *American Airlines, Inc., et al.*, ___ F.2d ___ (7th Cir., 1975), printed in Appendix D accompanying Roberts' petition before this Court. References to this decision will be to that Appendix, cited as "Appendix D."

The fares in issue here were increased fares set by the Civil Aeronautics Board ("Board") without complying with the notice and hearing procedures required in the Federal Aviation Act of 1958 (hereinafter referred to as the "Act").[3] Because of that procedural error, the Court of Appeals held the fares unlawful and remanded "for further proceedings."[4] In the subsequent proceedings before the Board and the Court of Appeals, which are the subject of Roberts' petition, recovery was denied on the grounds that the increased fares were just and reasonable and did not unjustly enrich the air carriers. In reaching this result, both the Board and the Court of Appeals applied the basic principles of the equitable remedy of restitution. Every court and agency which has considered Roberts' claims has held that restitution is the only remedy, if any, in such circumstances.

Roberts, too, has recognized that restitution is the proper remedy to be considered here. Petition, p. 3, fn. 1. He departs from the Board and the courts, however, in arguing that "restitution is the proper remedy *without regard to the reasonbleness of the 'unlawful' fares.*" *Id.*, emphasis added. In this respect Roberts has grossly misconceived the nature of the equitable remedy of restitution. As this Court held in *Atlantic Coast Line* and in *Morgan*, a prime, if not decisive, consideration in determining whether restitution should be required is whether the fares were just and reasonable. Thus, none of the questions posed in the Roberts' petition is legitimately presented by the opinion below, and the petition should be denied.

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[3] 49 U.S.C. §1301, *et seq.*

[4] *Moss v. Civil Aeronautics Board*, 430 F.2d 891 (D.C. Cir. 1970). This was the first decision regarding the fares at issue, and will be referred to as "*Moss I.*"

STATEMENT

The opinion of the Court of Appeals contains a concise statement of the facts necessary for consideration of the questions raised by Roberts. For the Court's convenience and to place the petition in proper perspective, Braniff *et al.* will here recite a brief summary of the history of the proceeding below and related collateral proceedings.

This case arose from an order of the Board which: (1) determined that the air carriers required additional revenues; (2) suspended six different carrier proposals for increased fares; and (3) presented the Board's own fare formula, which if adopted by the carriers would provide them with increased fares and revenues. Order 69-9-68. The carriers, needing additional revenue, filed increased fares in accordance with the Board's formula. A group of congressmen led by Representative Moss (collectively referred to as the "Moss Group"), who had opposed a fare increase, sought review of the Board's order. The Court of Appeals held, in *Moss I*, that the Board's order was invalid and that the fares filed pursuant to the Order were unlawful because the Board had made rates without affording the public notice and hearing required by §1002 of the Act. The decision pointed out that: "As a practical matter, the Board's order amounted to the prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible." *Moss I*, 430 F.2d 891, 897.

The Court remanded "for further proceedings." It did not address the Moss Group's request that it grant refunds to passengers. Within two weeks of the decision, the Moss Group filed a supplemental complaint with the

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Board urging that it "institute an adjudicatory proceeding" to provide relief from the alleged "excessive fares." Thereafter, the Board instituted an investigation "to determine whether the fares . . . were unjust and unreasonable, and if so, the amount of any overcharges that resulted . . ." Order 71-2-109.[5] Concurrently, and as a consequence of *Moss I*, seven separate class action suits were filed seeking recovery of alleged overcharges as a result of the unlawful fares. Pursuant to 28 U.S.C. §1407(a), the proceedings were consolidated in the District Court for the Northern District of Illinois.[6] Roberts' suit was one of the seven consolidated.

Following the consolidation, the air carrier defendants sought a stay pending completion of the Board's investigation into the reasonableness of the unlawful fares. In rejecting the same arguments presented here in the Roberts' petition and in granting a stay, the district court relied directly upon this Court's holding in *Atlantic Coast Line*. It recognized that this was an action "for money had and received which is founded in equity" and "that in weighing the equities of this case, the question of the reasonableness of the fares will play an important or even decisive role" *Weidberg v. American Airlines, Inc.*, 336 F. Supp. 407, 410 (N.D. Ill. 1972). Continuing, the District Court stated·

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[5] Roberts has erroneously asserted that the Board exceeded its statutory authority and the mandate of the Court in *Moss I* by "initiating . . . essentially a *second* proceeding." Petition, pp. 9, 11-12, 21-22. It is clear to all but Roberts that the proceeding below was responsive to the Moss Group's supplemental complaint and to the directive of the court, and that the Board's action was consistent with its primary jurisdiction. See, for example, *Weidberg*, 336 F. Supp. 407, 408, 409, and *Moss II*, Appendix A, p. 2, fn. 1.

[6] *In re Air Fare Litigation*, 322 F. Supp. 1013 (J.P.M.L. 1971).

"Paraphrasing Cardozo [in Atlantic Coast Line], in order for plaintiffs to prevail it must appear that the equities are so in favor of the plaintiffs that this court is duty bound to make the air carriers pay a considerable sum as reparations for the blunder of the C.A.B." *Id.*, pp. 410-411.

After a full evidentiary hearing, briefing and oral argument, the Board found that the fares in question were just and reasonable and that the carriers had not been unjustly enriched. It concluded that under the doctrine of *Atlantic Coast Line* it would be inequitable to order any payment and dismissed the Moss Group's supplemental complaint.

The Moss Group and Roberts sought review of the Board's order in the District of Columbia Circuit. While their appeals were pending, the District Court in Illinois *sua sponte* dismissed as moot the consolidated class action suits. The court's action was triggered by and based upon the Board's decision that the fares were just and reasonable. Roberts and three other plaintiffs sought review of the district court action in the Seventh Circuit.

Thereafter, the District of Columbia Circuit issued its decision in *Moss II* affirming the Board's decision. The essence of the Court's affirmance was as follows:

"The question now is whether there is to be a recovery of any part of those unlawful fares. The Board has denied such relief on the grounds that the fares in question were not unjust or unreasonable, and, in any case, resulted in no unjust enrichment of the airlines. We conclude that these decisional principles are determinative, and that they were correctly applied." Appendix A, p. 2.

Roberts' subsequent motion for rehearing and a

hearing *en banc* was denied.[7]

Three weeks later, the Seventh Circuit issued its decision in *Roberts*, affirming, as modified, the district court's dismissal of the class action suits. That court specifically embraced and adopted the District of Columbia Circuit's decision in *Moss II*.

> "We accept as conclusive the CAB finding now affirmed by the *Moss II* court, that the air carriers were not unjustly enriched by collecting the fares in question. Under these circumstances, *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935), and *United States v. Morgan*, 307 U.S. 183 (1939), preclude a restitutionary remedy." Appendix D, pp. 48-49, fn. 2.

The court in *Roberts* also noted that before *Moss II* was decided, it had prepared "a preliminary draft of an opinion . . . which reached the same result as did the opinion in that case and for substantially the same reasons." Appendix D, p. 49, fn. 3. The *Roberts* court added that: "No purpose was seen in preparing the final draft of this opinion for repeating what Judge McGowan stated so effectively in *Moss II*." *Id.*

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As noted, there is no special or important reason for this Court to review the instant case, and the writ should not be granted. The decision of the Court of Appeals is

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[7] The Moss Group, which had been the moving force throughout the litigation concerning the unlawful air fares, did not seek a rehearing or hearing *en banc* and did not petition for a writ of certiorari.

not in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided a federal question in a manner conflicting with applicable decisions of this Court. Indeed, the Court of Appeals relied upon and followed this Court's decisions in *Atlantic Coast Line* and *Morgan*.

1. ***Roberts Misconceives The Governing Legal Standard. Restitution Is Not Automatic As A Matter Of Law, But Depends On The Equitable Standards Enunciated By This Court In* Atlantic Coast Line *And* Morgan.**

Roberts' principal argument is that the decision of the Court of Appeals in *Moss I* requires restitution of all or some portion of the revenues collected, without any consideration of whether or not the fares were just and reasonable, or of any other equitable factors. Roberts asserts that the procedural defects present in *Moss I* rendered the fares void *ab initio*, making the tariffs "unlawful" in the sense that the carriers could not retain the revenues collected as a matter of law. As a corollary, Roberts argues that the Board had no authority to inquire into the reasonableness of the fares, even as an aid to the various courts considering claims to the revenues collected. Roberts asserts that the writ should be granted because the decision below: (1) disrupts the traditional allocation of functions between the Board and the courts, and (2) extinguishes certain common law remedies, contrary to §1106 of the Act.

In these arguments, Roberts has misconceived the governing legal principles established by this Court. An overwhelming body of precedent contradicts Roberts' contentions. Where, as here, an agency order prescribing fares or rates has been held invalid on judicial review, the rates are not void *ab initio*, and restitution is not automatic

as a matter of law. The well established and controlling standard is an equitable test: would it be inequitable for the carriers to retain the revenues collected pursuant to the invalid agency order? Moreover, the agency has primary jurisdiction to determine whether the fares were just and reasonable, because the principal, if not dispositive, equity is whether the fare payers were harmed by collection of the unlawful fares.

a. The Court of Appeals properly found* Atlantic Coast Line *to be controlling.

The leading precedent is *Atlantic Coast Line*. There, this Court had previously overturned an order of the Interstate Commerce Commission requiring certain railroads to establish increased rates for the movement of lumber in Florida in order to eliminate an unjust discrimination against interstate commerce. The Court had found the ICC's findings in support of its order to be inadequate. The railroads, however, had charged the prescribed higher rates for two years during the period of judicial review. Following the judicial reversal, some shippers sought to recover the difference between the higher rates established by the ICC and the pre-existing rates, on much the same grounds asserted here by Roberts.

This Court, reversing the district court's award of partial restitution, rejected the contention that the claimants were entitled *as a matter of law* to the difference between the ICC prescribed rates and the "last lawful rates." The Court held that recovery depended on the equitable question of whether the carriers would be unjustly enriched by retaining the increased amounts.

"The claimant, to prevail, must show that the money

> was received in such circumstances that the possesser will give offense to equity and good conscience if permitted to retain it. [Citations omitted] The question no longer is whether the law will put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it." 295 U.S. 301, 309-310.

Although the Court avoided stating any rigid rules in weighing the equities, the decisive element in its holding was the subsequent ICC determination that the higher fares were reasonable and non-discriminatory. The Court also made clear that although the ICC had no power to award reparations, ". . . it was not without power to inquire whether injustice had been done and to make report accordingly." *Id.* at 312. Significantly, the Court found that the district court had erred in failing to give adequate weight to the ICC's subsequent determination of reasonableness, having relied instead on the report of a special master. *Id.* at 318.

This Court reaffirmed the principle of *Atlantic Coast Line* in *Morgan*.[8] There, the Court had first reversed the prescription of new, lower rates for services provided by stockyard operators in Kansas City under the Packers and Stock Yard Act of 1921,[9] because the Secretary of Agriculture had failed to provide an appropriate public hearing. The stockyard owners had continued to collect the higher rates during the review period, but had paid the difference between the pre-existing rates and the new lower rates into a fund held by the district court. After the Supreme Court's reversal of the Secretary's

[8] 307 U.S. 183 (1939).

[9] 7 U.S.C. §181, *et seq.*

prescription, the district court held that the stockyard owners were entitled to the funds as a matter of law. *Morgan v. United States*, 24 F. Supp. 214 (W.D. Mo. 1938).

This Court then reversed, following its decision in *Atlantic Coast Line*. As to the claim that restoration of the funds was automatic, the Court held that the prescribed rates were voidable, not void *ab initio*. Referring to its decision in *Atlantic Coast Line*, the Court said:

> "There, as here, the administrative agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action." 307 U.S. 183, 195-196.

These Supreme Court decisions, holding that refunds are not automatic as a matter of law and that restitution depends upon the application of equitable standards, have been followed consistently in numerous decisions.[10]

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[10] See *Zuber v. Allen*, 396 U.S. 168 (1969); *Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922 (D.C. Cir. 1968), cert. denied, 393 U.S. 1081 (1969); *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission*, 485 F.2d 886, 913-915 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974); *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334 (D.C. Cir., 1971). See also *Moss II*, *Roberts*, and *Weidberg* in which each court considered and rejected the claims Roberts again asserts here.

Also to be considered is the fact that the application of *Atlantic Coast Line* and *Morgan* in *Moss II* rests on important policy considerations. Under §403 of the Act [49 U.S.C. 1373(a)], the air

b. This case cannot be distinguished from Atlantic Coast Line.

Roberts seeks to distinguish this proceeding from *Atlantic Coast Line* on the ground that the unlawful fares here were the product of a collusive undertaking by the Board and the carriers. Petition, p. 16. This argument has been rejected by the Board and the courts.

The Board did not believe the fare formula which it proposed in its September, 1969 order was one which would be readily embraced by the carriers. Recognizing the carriers' urgent need for additional revenues, the Board literally said in its defective order that if the carriers wanted a fare increase in the foreseeable future, they had to take it on the Board's terms, or not at all. Order 69-9-68. Even the Moss Group, the carriers' key protagonist, recognized the nature of the Board's September 12, 1969 order and exactly what the carriers' position was. The Moss Group emphatically told the court in *Moss I* that ". . . it is preposterous to ignore the significant elements of pressure applied upon the carriers to file tariffs in accordance with the Board's formula,"

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carriers could charge only the fares in currently effective tariffs, even though the Board's original fare orders were under review. See *Moss I*, 430 F.2d 891, 897. Charging any other fare would have exposed the carriers to the severe civil and criminal penalties provided in the Act. See § 901 and 902, 49 U.S.C. §§ 1471(a)(1) and 1472. Application of the rule suggested by Roberts, that restitution be due automatically as a matter of law, would create unreasonable risks for carriers which comply with Board orders prescribing fares. See *Weidberg*, 336 F. Supp. 411, 412. Moreover, under the Act, air carriers are entitled to a fair rate of return for the services they provide. Requiring automatic restitution where the Board has made a procedural "blunder" in prescribing fares could well undermine the carriers' opportunity to achieve a fair return. Thus, the justness and reasonableness of the fares collected during the review period must be an important, if not controlling, factor in determining whether restitutiuon is appropriate.

and that "[a]s a practical matter . . . the carriers were compelled to go along with the Board's proposal of September 12; and, in fact, the carriers did so." Moss Group brief, *Moss I*, January 23, 1970.

The court agreed. Indeed, it recognized that the Board had employed its "system" to *force* the carriers to accept the rate structure the Board had devised as a condition to obtaining the fare increase, which the Board was well aware the carriers so urgently needed:

> "As a practical matter the Board's order amounted to a prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible."[11]

Moreover, the Court of Appeals below (the Court which also decided *Moss I*) did not interpret either *Moss I* or the events leading up to it as Roberts has. On the contrary, in *Moss II*, the Court characterized the errors in *Moss I* as procedural defects and explicitly recognized that the equitable standards of *Atlantic Coast Line* and *Morgan* controlled.

The Seventh Circuit has concurred in the *Moss II* view of the legal significance of *Moss I*. In affirming the district court's dismissal of the claims of Roberts and others for restitution, it said:

> "As originally argued, our primary task was to explicate the precise legal meaning of the *Moss I* holding that the September 12, 1969, CAB order was invalid and that the passenger tariffs were illegal. 430 F.2d at 902. The opposing parties found different meanings in the opinion, and they directed argument to the question whether the 1969 order was void or voidable. We think that *Moss II* clearly and correctly explicates the earlier decision and establishes that the CAB order

[11] *Moss I*, 430 F.2d 891, 897.

attacked in *Moss I* was voidable rather than void." Appendix D, p. 44. See also p. 49, fn. 3.

Finally, the cases chiefly relied on by Roberts to distinguish this proceeding from *Atlantic Coast Line* are inapposite. Here, as in *Atlantic Coast Line* and *Morgan*, an appellate court had overturned an agency rate prescription on direct review after the fares had been collected for a period in compliance with the order. In both *Vogelsgang v. Delta Air Lines, Inc.* 302 F.2d 709 (2d Cir. 1962) cert. denied, 371 U.S. 826 (1962), and *Tishman & Lipp, Inc. v. Delta Air Lines, Inc.* 413 F.2d 1401 (2d Cir. 1969), cited by Roberts, travelers were challenging provisions in carrier filed tariffs which were legally effective, and not subject to review and were, thus, in effect, making collateral attacks on the reasonableness of those provisions. Without deciding whether relief on those grounds would be precluded as being reparations not permitted by the Act, the courts held in each case that questions of reasonableness and discrimination ought to be decided by the Board in the first instance. However, in each instance the courts also found reference to the Board unnecessary, since neither had any indication that the Board was dissatisfied with the tariff rules at issue. Both courts also questioned, but did not decide, whether retroactive invalidation was lawful in the context of a collateral attack.[12]

[12] 302 F.2d 709, 713; 413 F.2d 1401, 1406. These cases are, in fact, consistent with *Moss II* in their view of the Board's authority and primary jurisdiction to determine questions of reasonableness and discrimination, even where the issue of appropriate relief, if any, is one for a court. An entirely different case is presented where a user alleges that a carrier has mis-applied an effective tariff without challenging its reasonableness. That was the situation in *Hewit-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), cited by Roberts, which has no relevance here.

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2. *The Board Had Ample Authority To Consider The Equity Of Restitution And The Reasonableness Of The Fares.*

The same body of precedent discussed above contradicts Roberts' assertion that the Board had no authority to consider the reasonableness of the fares collected during the review period. In *Atlantic Coast Line*, the Court recognized that the ICC had no authority to prescribe rates retroactively, but held that the agency had the power "to inquire whether injustice had been done and to make report accordingly." 295 U.S. 301, 312. The court in *Moss II* reached the same conclusion, noting that §204 of the Act[13] provides explicit authority for the Board to "conduct such investigations . . . as it shall deem necessary to carry out the provisions of . . . this chapter." Appendix A, p. 17. This Court interpreted similar statutory provisions in the Packers and Stock Yard Act as authorizing the Secretary to make such a determination as to the reasonableness of fares already collected:

> "Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund."[14]

This proceeding provided a most appropriate occasion for the courts to apply the doctrine of primary jurisdiction and defer to the Board for an initial determination of the reasonableness of the fares. Questions of the reasonableness of rates traditionally fall within the

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[13] 49 U.S.C. §1324(a).

[14] *United States v. Morgan*, 307 U.S. 183, 193-194.

primary jurisdiction of appropriate administrative agencies. See *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1927); *Atlantic Coast Line R.R. v. Florida, supra*; *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972); and *Weidberg v. American Airlines, supra.*

Thus, permitting the Board to investigate the reasonableness of the fares and to examine the equities in the first instance reflected an appropriate allocation of responsibilities between the courts and the Board, and not the disruption alleged by Roberts. (See Petition, p. 18). As the district court said in *Weidberg* in staying further proceedings in the consolidated class actions: "The rationale of the [primary jurisdiction] doctrine is a recognition of the need for an orderly coordination of work between the judiciary and administrative bodies for the reason that those bodies can apply their . . . expertise to the question and thereby aid the court by laying a foundation for a more intelligent disposition . . . as well as insuring uniformity of result." 336 F. Supp. 407, 409.

3. Moss II *Did Not Extinguish Any Common Law Remedies Which Might Be Available.*

By affirming the Board's order under review, the court did not extinguish common law rights as Roberts claims. Early in its opinion, the court in *Moss II* noted the theoretical possibility that the petitions below might attempt to seek relief from several different forums—the Board, the Court of Appeals itself, a district court or a combination thereof. In fact, various claimants sought relief in each of these forums, but each was denied relief under the same, well established standards enunciated in *Atlantic Coast Line* and *Morgan*. The Moss Group sought relief at the Board, which denied the Moss Group's supplemental complaint after a full and fair hearing. Both

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the Moss Group and Roberts then sought review in the D.C. Circuit, which affirmed the Board's determination in a thorough and well reasoned opinion.

More importantly, the District Court for the Northern District of Illinois dismissed the class actions in which Roberts (and others) sought recovery under common law theories of restitution. The Seventh Circuit upheld the dismissal as a summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure. Appendix D, p. 46.

Contrary to Roberts' contention, affirmance of the Board's order in *Moss II* did not extinguish any right to seek common law restitution that might exist under the savings clause of the Act.[15] The District Court and the Seventh Circuit disposed of those claims on the merits. Roberts thus had ample opportunity to pursue his claim in every possible legal forum, but each denied it, applying the same, well established standards.[16]

CONCLUSION

It is apparent from the foregoing discussion that there are no novel or serious issues presented here which warrant the Court's time and attention. There are also no special or significant reasons for review on writ of certiorari. The proceeding involves simply well estab-

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[15] §1106 of the Act, 49 U.S.C. 1506.

[16] Roberts' final contention—that the Board exceeded the scope of its mandate from the court of appeals in *Moss I*—is conclusively rebutted by the same court's decision. If the Board had exceeded the District of Columbia Circuit's mandate in *Moss I*, the same court obviously would have said so in *Moss II*.

lished equitable principles of restitution, and nothing more.

WHEREFORE, it is respectfully requested that the writ of certiorari be denied.

Respectfully submitted,

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